IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 755

SAMUEL R. FRAZIER, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

On Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District of California

PETITION FOR REHEARING

I.

On January 17, 1966, this Court denied the Petition for Certiorari in this case, Mr. Justice Black noting his opinion that certiorari should be granted. Two days later this Court decided *Tehan* v. *United States ex rel. Shott,* 34 LW 4095, holding that the doctrine of *Griffin* v. *California,* 380 U.S. 609, will not be applied to convictions which became final before it was announced. This result was predicated on the purpose of the privilege against self-incrimination, which the Court's opinion in *Tehan* explicated in terms of most immediate relevance to this case:

> "First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted *unless the prosecution 'shoulder the entire load'* " (34 LW at 4098).

The California courts did not require the prosecution to "shoulder the entire load" in convicting petitioner. On the contrary, they compelled him to contribute to his own conviction by revealing substantial elements of his case in advance of trial and by turning over to the prosecution not only the names of witnesses whom he would call, but statements obtained by his counsel from prosecution witnesses, substantially inhibiting his opportunity to impeach those witnesses on cross-examination. They based these discovery orders on *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879. Yet even assuming the validity of the premise of the *Jones* decision, that discovery invariably promotes truth,[1] California's subordination of the privilege against self-incrimination to that objective cannot be squared with the proposition that "the Fifth Amendment privilege against self-incrimination is not an adjunct to the ascertainment of truth". *Tehan, supra,* 34 LW at 4098. See also Pet. pp. 19-20. In short, the Supreme Court of California in *Jones* (which was decided before *Malloy* v. *Hogan,* 378 U.S. 1) and the courts below in this case (where petitioner relied on *Malloy*) have failed to effectuate the distinction between an accusatorial and an inquisitorial sys-

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[1] As demonstrated in our Petition (pp. 19 and 21-23) and herein (p. 4 *infra*), the record in this case discredits that premise. As Judge Aldrich has said:

> "If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in 'knowing the truth before trial' is prompted primarily by a desire to find the most plausible way to defeat the truth." *Margeson* v. *Boston and Maine Railroad,* 16 F.R.D. 200, 201 (D. Mass.).

See also *Fidelis Fisheries* v. *Thorden,* 12 F.R.D. 179, 180 (S.D.N.Y., Weinfeld, J.).

tem of prosecution, which the Fifth Amendment is designed to secure, as *Malloy* held and as *Tehan* has now reiterated. (Indeed, the opinion in *Tehan* quotes the precise language from *Malloy* on which our petition for certiorari explicitly relied. Compare 34 LW at 4091 with Pet. p. 10.) Thus, *Tehan* reinforces our contention that Petitioner has been deprived of his liberty by procedures "probably not in accord with the applicable decisions of this court". Rule 19 1(a).

It is plain that the Supreme Court of California takes a far more restrictive view of the privilege against self-incrimination than does this Court. In *People* v. *Modesto,* 62 Cal. 2d 436, Mr. Justice Traynor declared that a prosecutor's comment on a defendant's failure to testify is not so direct a penalty for exercising the right of silence that it violates the Fifth Amendment. It is understandable, therefore, that the same court would consider a requirement that the defendant submit information to the prosecution in advance of trial to be a permissible limitation on his right to silence; and that indeed was its reasoning in *Jones* v. *Superior Court, supra.* But this Court in *Griffin* v. *California, supra,* expressly disapproved *Modesto,* see 380 U.S. at 614.[2] The holding in *Griffin* that the California comment rule cannot survive *Malloy* was predi-

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[2] A further indication of this conflict in constitutional philosophies is the California Supreme Court's recent decision in *People* v. *Thayer,* 63 A.C. 664. There the court declined to follow *Gouled* v. *United States,* 255 U.S. 298 which holds that evidentiary searches are forbidden by the Fourth and Fifth Amendments. It would appear that it is precisely with respect to evidentiary searches that the proposition that these Amendments run "almost into each other" is most apposite. See *Boyd* v. *United States,* 116 U.S. 616, 630; *Gouled* v. *United States,* 255 U.S. 298, 306; *United States* v. *Lefkowitz,* 285 U.S. 452, 466-467; *Malloy* v. *Hogan,* 378 U.S. 1, 8. The *Gouled* principle is, of course, an additional basis for reversal here since the orders to produce encompassed tangible property, see Pet. pp. 7-8, and p. 11, n. 6.

cated in part on the view that the Constitution forbids even the slightest penalty for exercising the constitutional privilege. Perhaps even more importantly, this Court recognized that the constitutional right of silence is an adjunct of the presumption of innocence which adheres to every defendant. But that presumption is denied effect where, as here, a defendant is required to give information to the prosecution tending to support his innocence before the prosecution has put on any evidence, let alone made out a *prima facie* case that he is guilty.

In emphasizing that the privilege against self-incrimination has purposes other than the ascertainment of truth we do not intend to minimize the substantial interference which disclosure in this case did have with the truth-seeking process. The court below reasoned that the order to produce the statements which counsel had obtained from the prosecution witnesses *aided* the defendant because "the effect of the witnesses' having seen the statements would have been to caution them against testimony more unfavorable to appellant than that contained in the statements". Pet. P. 11a. We submit that this reasoning is tantamount to a concession that petitioner was denied due process of law. For a defendant is, of course, entitled to a trial based on the true recollection of the prosecuting witnesses rather than on the testimony which they believe is least likely to subject them to successful impeachment by cross-examination. The constitutional right of confrontation and cross-examination, made applicable to the states in *Pointer* v. *Texas,* 380 U.S. 400, as well as the most elemental notions of due process require no less.

The order to produce the statements of the prosecution witnesses interfered likewise with the petitioner's constitutional right to counsel. Our petition for certi-

orari pointed out that the compulsory disclosure of counsel's work product inevitably inhibits counsel's preparation for trial, See *Hickman* v. *Taylor,* 329 U.S. 495, 511, for which the Constitution guarantees criminal defendants the effective assistance of counsel. See the cases cited in Pet. p. 21 and *Townsend* v. *Bomar,* 351 F. 2d 499 (CA 6). The conclusion that petitioner was deprived of his constitutional right to counsel follows also from the principle that under our "adversary system of criminal justice" *Gideon* v. *Wainwright,* 372 U.S. 335, 344, a defendant is entitled to the undivided loyalty of his counsel, *Glasser* v. *United States,* 315 U.S. 60; *Tucker* v. *United States,* 235 F. 2d 238 (CA 9); *Case* v. *North Carolina,* 315 F. 2d 743 (CA 4). An order that counsel produce materials which he has obtained in defendant's behalf but whose use would also benefit the prosecution (which seeks to obtain such benefit by its discovery motion) compels him to choose between protecting the interests of his client, the defendant, and saving himself from the sanction of contempt. The conflicts which were found to vitiate the convictions in the cited cases seem insignificant by comparison. Cf. *Goodson* v. *Peyton,* 351 F. 2d 905, 909 (CA 4) disapproving the Virginia practice of appointing Commonwealth Attorneys from one county as defense counsel in other counties because it is "likely" to create conflicts of interest.

II.

The question presented by this case potentially affects all convictions in California where the prosecution has obtained compulsory discovery from the defendant, as well as those in fourteen other states where the defendant has been required pursuant to statute to give notice of an alibi defense before trial. Our original assertion that "the question is important to the administration of criminal justice" (Pet. p. 24), remains undenied.

If this Court nonetheless has doubts regarding the prevalence of this practice we urge that it call for a response from the Attorney-General of California who alone would know the extent of the state's utilization of the discovery procedures sanctioned by *Jones* v. *Superior Court, supra.*

Because of the nature of the accusation (which petitioner steadfastly denies) the record in this case is not attractive. But we submit that it comports with neither the efficient nor the equal administration of justice to allow petitioner's conviction to stand and to postpone decision of this question until it is raised again, perhaps in a capital case. The disadvantage of delay is underscored by the decision in *Tehan, supra,* which, though holding that *Griffin* v. *California* (and presumably *Malloy* v. *Hogan* also) will only operate prospectively, acknowledges that convictions which have become final since those decisions were rendered are subject to their rule. 34 LW at 4096, n. 3. See also *Banks* v. *California,* 34 LW 3256, No. 87 Misc., Oct. Term 1965. Thus, until the substantial constitutional question raised by this case is resolved, all convictions where the prosecution has obtained compulsory discovery since *Malloy* will be subject to attack both on direct appeal and in post-conviction proceedings in state and federal courts.

The question presented by this case is worthy of review also because of its potential impact on the proposed amendments to the Federal Rules of Criminal Procedure. The Advisory Committee proposed an amendment to rule 16(c) which would allow a trial court to condition discovery in favor of defendants on the granting of reciprocal disclosure by the defendant to the prosecution, 34 F.R.D. 411, 422, citing *Jones* v. *Superior Court, supra* in support of the constitutionality of this proposal. Id. at 423. In a committee note,

an alternative draft of rule 16(c) is set forth which would allow discovery by the Government of matter which the defendant intends to produce at the trial. Id. at 425. This proposal would in effect codify the rule of *Jones* v. *Superior Court* for federal cases. Indeed, its very phraseology—"the defendant intends to produce at the trial"—embraces the fallacy which underlies the *Jones* decision, that a defendant can be required to determine what evidence he will introduce before the prosecution has put on its case. See Pet. pp. 17-19. Thus, the same question which this case presents will necessarily be before this Court when, in the exercise of its rule-making authority, it passes on the proposed amendments to the rules. Surely it is preferable that consttitutional questions be decided in an adversary proceeding where the Court will have the benefit of the briefs and arguments of counsel. Indeed, it is particularly appropriate here where the constitutional question involves the interest of many states, whose law enforcement officials would not normally be expected to comment on proposed amendments to the Federal rules. Moreover, the Court's conclusions in a case are precedents which guide other courts while the reasons for the rejection of proposed rules remain unknown. In this connection it is useful to recall that when the Federal Rules of Criminal Procedure were originally adopted one of the proposals was that defendants be required to give notice of an alibi defense. This proposal was not adopted, but as the Court did not reveal whether its rejection was due to constitutional doubts, the proposal reappeared in the preliminary draft of proposed amendments, 31 F.R.D. 665, 675-676. It was later dropped, again without explanation. See Pet. p. 24, n. 33.

We recognize that petitions for rehearing of denials for certiorari are not favored, but they are not in-

evitably without merit. Though it may seem surprising in retrospect, now that *Hickman* v. *Taylor, supra* is recognized to to be a leading precedent on the scope of civil discovery, certiorari was originally denied in that case, 327 U.S. 808, and was granted only on rehearing, 328 U.S. 876. The significance of the present case for discovery in criminal cases (both in favor of and against the prosecution, see Pet. pp. 24-26) similarly counsels careful reconsideration of the original denial of certiorari herein.

CONCLUSION

For the reasons stated herein the order denying certiorari should be vacated and the Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GEORGE KAUFMANN

February 11, 1966